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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 212

FRED BARNETT AND EDNA M. BARNETT,
*Petitioners,*

*vs.*

RECONSTRUCTION FINANCE CORPORATION,
A CORPORATION,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

DOMINIC P. SEVALD,
502 Hammond Building,
Hammond, Indiana,

FRED BARNETT,
313 Hammond Building,
Hammond, Indiana, and

JESSE W. MCATEE,
1st National Bank Building,
East Chicago, Indiana,
*Counsel for Petitioners.*

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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*vs.*

RECONSTRUCTION FINANCE CORPORATION,
A CORPORATION,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

---

*To the Honorable, the Supreme Court of the United States:*

Fred Barnett and Edna M. Barnett, for their Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, respectfully set forth and represent to this Honorable Court the following:

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

---

The Reconstruction Finance Corporation, respondent, as plaintiff, filed this action in the United States District Court, for the Northern District of Indiana, Hammond Division, against petitioners, Fred Barnett and Edna M. Barnett, on January 20, 1938, to recover upon a

promissory note for $5400.00 and to foreclose a real estate mortgage given to secure payment of the note. On April 15, 1940, the district court rendered judgment for defendants and against the plaintiff (R. 98).

On appeal by the Reconstruction Finance Corporation to the United States Circuit Court of Appeals, for the Seventh Circuit, the judgment of the trial court was reversed on February 5, 1941 (R. 122), (*R. F. C.* v. *Barnett, et al.*, 118 F. (2d) 190). Thereafter on February 19, these petitioners filed their Petition for a Rehearing, and which was overruled and denied on March 27, 1941 (R. 137).

The present action is the third one brought to recover on this note and mortgage. The first was filed April 30, 1931, in the Superior Court of Lake County, Indiana, (at Hammond), by the Chicago Trust Company, the original owner of these securities, against Fred Barnett and Edna M. Barnett, these petitioners, and others. After a change of venue was taken from that court to the Circuit Court of Porter County, Indiana (Valparaiso) a judgment of foreclosure was there rendered on October 14, 1932, in favor of the Central Republic Bank and Trust Company, which had been substituted as plaintiff, and against these petitioners as defendants. From this judgment these petitioners perfected an appeal to the Appellate Court of Indiana, where on June 15, 1935, the judgment of the trial court was reversed. (*Barnett* v. *Central Republic Bank and Trust Company*, 100 Ind. App. 495, 196 N. E. 369.)

In that action these defendants as a part of their answer set forth that the Chicago Trust Company was an Illinois Corporation, and never at any time obtained a license to transact its corporate business as a foreign corporation in the State of Indiana, as required by Burn's R. S. Ind. 1926, Secs. 4909, 4910, 4913, 4918 and 4923. (See Appendix, pp. 49-51.) Further, that it did nevertheless in violation of this statute maintain an office in Ham-

mond, where among numerous others, it solicited and granted the loan evidenced by the note and mortgage in question, and through said office carried on all the necessary negotiations to complete such loan, including the signing and delivery there by these defendants of the note and mortgage, together with all other documents included in the transaction, and filed this mortgage for record in the recorder's office of said Lake County, thereby invoking and obtaining the protection of the Indiana recording laws (R. 32).

This foreign corporation act required an applicant to file certain documents in the office of the Secretary of State, to maintain a local office in the state, to pay the required license fee, and appoint a qualified domiciled agent in the state upon whom service of legal process could be made, etc. For a violation of these provisions, the offender was made subject to a fine, its business in the state could be stopped, and it was denied the use of the state courts to enforce its legal actions until it complies with the act. The Chicago Trust Company, while the owner of these securities, became insolvent surrendered its corporate charter, and was, with another company, merged into a new corporation known as the Central Republic Bank and Trust Company, and that by reason of its insolvency and dissolution reached a status where it could not thereafter comply with such foreign corporation act, and whereby it was barred from a recovery on this note and mortgage; that the Central Republic obtained title to these securities by virtue of such merger.

All these facts were set forth in this answer, and to it the plaintiff filed a motion to strike out this paragraph of such answer. This motion was sustained by the trial court, and for this error the Appellate Court reversed the judgment, holding that this part of the answer set forth a good defense, and if proven would operate as a complete bar to the action. On remand of this case back to the trial

court, the plaintiff voluntarily dismissed its complaint on November 30, 1937, and the cause is still pending undetermined there on petitioners' cross-complaint (91). For convenience, we will hereinafter refer to this action as the "State Court Case."

The Appellate Court of Indiana is a court of appeals and review of judgments of the trial courts. Its decisions are final, excepting and unless, after a petition for rehearing is filed within the prescribed time and overruled, a petition is thereafter timely filed in the Supreme Court for a transfer of the cause to the latter court and such transfer granted. No petition for a rehearing was filed in this appeal; neither was a petition for transfer filed, consequently the opinion and judgment of the Appellate Court is final. (Burn's R. S. Ind., 1933, Secs. 4-214 and 4-215.)

The second action to recover on this note and mortgage was filed by the Central Republic Bank and Trust Company, as plaintiff, against these petitioners and others, as defendants, on March 14, 1932, in the United States District Court below. It was voluntarily dismissed by that plaintiff on October 21, 1932, one week after the same plaintiff obtained its judgment in the state court case in the Porter Circuit Court (R. 92).

In the present case we plead in our answer the voluntary dismissal of these two former actions as an adjudication on the merits of the issues involved, as provided by Rule 41-(i) of the rules governing civil procedure in the District Courts, effective September 18, 1938. But since this effective date was subsequent to the date of filing the present action below, the Circuit Court below held it did not apply herein. (Opn. Cir. Ct., R. 123 and Appendix, p. 39.)

The material and important facts and issues herein, as disclosed by the complaint, our answer, and the evidence as contained in the special finding of facts made by the trial

court below, show that on February 18, 1927, petitioner Edna M. Barnett was the sole owner in fee of Lots 54 and 55, in Block 7, in Homewood Addition to the city of Hammond, Lake County, Indiana, improved by a dwelling house, the same then and now occupied by her and her family as their dwelling. On this day she and her husband, petitioner Fred Barnett, executed their promissory note for $5400.00 payable to the order of themselves and by them endorsed and delivered to the Chicago Trust Company. This note was made payable on the semi-annual installment plan as to principal and interest, beginning February 1, 1928, with a final payment of $615.00 on the principal due August 1, 1942.

They secured the payment of this note, by executing their mortgage on this real estate to the Chicago Trust Company and Willard F. Hopkins as trustees. Default having been made by petitioners in the payment of installments on the note, the respondent, who claims to hold the securities by an assignment or pledge, from the Central Republic, filed this present action to recover on the note and to foreclose this mortgage. Issues were joined between the plaintiff and other defendants. A second mortgage due the Receiver of the Hammond National Bank & Trust Co., a defendant below having been paid during the pendency of this suit, and the issues as to other defendants having become immaterial, they need no further mention.

The complaint filed below states in substance the execution of the mortgage by petitioners, as set out above, that there was default in the payment as contained in the covenants of the mortgage. For its ownership of the securities, plaintiff says that the Chicago Trust Company, the original mortgagee, was merged into and with the Central Republic Bank and Trust Company. That thereafter the Central Republic became indebted to plaintiff for $30,000,000.00; and that it received from the Central Republic the note and mortgage in question, among other

assets, as a pledge to secure said indebtedness; and that it brings the present action as pledgee of said securities.

A further allegation recites that in April, 1931, a former action was brought, based upon the same note and mortgage, by its original holder, Chicago Trust Company, against petitioners and others to foreclose the same mortgage. That after substitution of the plaintiff in said cause and while the action was pending in the state court, the defendants, these petitioners, filed an answer alleging in substance that the Chicago Trust Company was an Illinois corporation and was doing business in the State of Indiana without having first obtained a license to do so as a foreign corporation, and that under the laws of the State of Indiana such corporation was denied the right to resort to the courts of said state to enforce its action. That said mortgage and note were valid contracts, but not enforceable in the state courts of Indiana, and that neither of the parties to said action could obtain any relief in the state courts (R. 8).

In the present action these petitioners filed practically the same answer as in the State court case, setting forth in substance the foregoing statements relative to the noncompliance by the former plaintiff with the Indiana Foreign Corporation Act, and stating with more particularity that petitioners applied for this loan and signed all papers necessary in and about obtaining it including the note and mortgage in question, at an office which the Chicago Trust Co. at the time unlawfully maintained in the City of Hammond, Lake County, Indiana, and where all the details of the transaction were carried on, and to all effects the contract in question was an Indiana contract.

It is also alleged that the mortgagee recorded its mortgage in the recorder's office of Lake County, Indiana, where it obtained and received the benefit and protection afforded by the recording laws of Indiana. Further, it is alleged that while the Chicago Trust Company was the

owner of these securities, it became insolvent, ceased to function as a corporation, surrendered its corporate charter and was thereafter merged and consolidated with another Illinois corporation newly created. The name for both being given a new name, Central Republic Bank and Trust Company, and that by reason of the former's insolvency and nonexistence, it cannot comply with such foreign corporation act.

This answer further recites all the foregoing facts relative to the proceedings in the state court case, asserting that the ruling laid down by the Appellate Court opinion in reversing the trial court's judgment became the law of the case; and further, that by plaintiff's voluntary dismissal of its complaint, after the remand, constituted an adjudication of the issues involved (R. 32-40 and 44-45).

Finding No. 8 of the special findings of fact (R. 85) sets out the opinion of the Appellate Court of Indiana in the state court case, and which is set forth in the record (R. 86). In this opinion the question was whether our paragraph of answer pleading noncompliance of the foreign corporation act was a plea in bar, and if it were such the trial court erred in striking it out, as it is held in Indiana that where a corporation has reached a state that prevents its compliance with the statute, such noncompliance may be pleaded in bar. It quotes from our answer:

> "Chicago Trust Company had been consolidated into and with, and had ceased to do business as a corporation, and its assets and affairs have been taken over by the plaintiff herein, The Central Republic Bank and Trust Company * * * that said Chicago Trust Company has ceased to function and operate as a corporation, and that it therefore cannot now comply with the foreign corporation act of Indiana."

The court then cites the leading cases of Indiana to the effect that such plea is one in bar and that this is also true where the successor in title to the original mortgage

was either an assignee or receiver. The answer sets up its noncompliance as a defense, and further sets out the facts relative to the appeal and reversal in the state court case, wherein the Appellate Court again declared the law construing this foreign corporation act.

The Circuit Court of Appeals below held that it was not so much a question whether the Indiana statutes and decisions forbade recovery on the contract,—that while recovery might not be had in the state court, such was no bar to a recovery in the federal court, holding that the contract was legal, and this notwithstanding the fact that the Appellate Court of Indiana had passed upon the very same question upon the same note and mortgage. The facts of the noncompliance by the Chicago Trust Co. with the Indiana foreign corporation act and its inability to recover in the state court were admitted in plaintiff's complaint (R. 8); likewise such is also contained in the trial court's special findings of facts (R. 68 and 90). The case at bar was decided upon the authority of *Metropolitan Life Insurance Co.* v. *Kane,* (117 F. (2d) 398, 7th Cir. Jan. 30, 1941), which case the court stated differed only in one slight particular from the present case, but with which statement we do not agree. Decidedly the Kane case was presented in a manner quite different from this one. The Circuit Court below conceded it was bound to follow the Indiana courts on their construction and application of this foreign corporation act, but evaded the issues we presented by asserting that the decision in *Peter and Burghard Stone Co.* v. *Carper,* 96 Ind. App. 554, 172 N. E. 313 (1933), is the last and true pronouncement by the state courts on this question, and the one to be recognized and followed. In this the Circuit Court is in error, as the Stone Co. case dealt with only the contract rights of a live corporation which did, before it filed its action, register as a foreign corporation, whereby all these restrictions imposed upon its corporate activities were removed. There

the status of a contract made by a noncomplying corporation, which afterwards went out of existence, was not in question. Apparently the Circuit Court below was impressed by the fact that the Stone Co. decision expressly overruled *U. S. Construction Co.* v. *Hamilton National Bank,* 73 Ind. App. 149, 126 N. E. 866 (1919), in which latter case it was held that contracts made by a noncomplying corporation were void, without regard to a later compliance with the act. As we consider the reasoning of the court below in the Kane case not well founded, we discuss that case more fully in our brief and argument presented herewith.

Another point we strenuously urged before the Circuit Court, but to no avail, was the effect of the Indiana Appellate Court decision. We asserted that the trial and judgment in the state court case, followed by our appeal and reversal, became the law of the case, to be thereafter followed by any court, federal or state, on a retrial of the same issues.

## JURISDICTION.

Plaintiff-Respondent, the Reconstruction Finance Corporation, being a federal governmental agency, as created by U. S. C. A., Sections 601-17, invoked the jurisdiction of the District Court below by virtue of Section 24 of the Judicial Code (U. S. C. A., Secs. 41-42), the amount involved exclusive of costs being in excess of $3,000.00, with a further showing that these defendants-petitioners were residents and citizens of Indiana, that the residence of the other defendants were properly shown, and that the land involved is situated in Indiana, and all as particularly shown in its complaint.

The Circuit Court of Appeals below assumed jurisdiction on appeal from the District Court, for the Northern District of Indiana, Hammond Division, under Section 128 Judicial Code (U. S. C. A., Sec. 225 A-1).

We assert this court is given jurisdiction to hear and determine our Petition for Certiorari by authority of Section 240 Judicial Code (U. S. C. A., Sec. 347-(a)), and as further provided for under Sub. Sec. 5-b of Rule 38, of the rules of this court, as adopted February 13, 1939.

## QUESTIONS PRESENTED.

### I.

Was it not the duty of the United States Circuit Court of Appeals for the Seventh Circuit to have followed the Indiana law, by holding that a recovery could not be had on the note and mortgage, where the original holder at the time these securities were taken and accepted by it, was unlawfully transacting its corporate business in Indiana, and then while so holding them became insolvent, ceased to exist, and thereby placed itself in a situation whereby it could never thereafter comply with this foreign corporation act. This is the law of Indiana as declared in its court decisions hereinafter referred to.

This question has been fully determined by this court in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 787, (1938) holding it is the duty of the federal courts to follow and apply the state statutes and decisions where no federal statute or question is involved. *Swift* v. *Tyson*, 16 Peters 1 (1842), is expressly overruled, and since the Erie case decision numerous like ones have been made by this court, some of which we recite in our supporting brief contained herein.

### II.

The Circuit Court of Appeals for the Seventh Circuit incorrectly interpreted the decisions of the Indiana Supreme and Appellate Courts in construing this foreign corporation law. All these decisions make a clear distinction between the rights of a live corporation and those of one that has ceased to exist. The former may still comply with the act, and then enforce its action in the state court while the latter being in no position to comply has forfeited all its rights, and they are thereby forever barred.

Then if these state courts have clearly defined this distinction, was it not the duty of the Circuit Court below to have pronounced its decision in conformity therewith?

III.

Was the Circuit Court of Appeals for the Seventh Circuit justified in holding as a matter of law, that even if the state courts barred recovery, plaintiff nevertheless could enforce its action in the federal court?

IV.

The decision of the Indiana Appellate Court in *Barnett* v. *Central Republic Bank & Trust Co.*, 100 Ind. App. 495, reversing the judgment rendered in the Porter Circuit Court became and is the law of the case, which must be followed on a retrial or on a second appeal. Therefore was it not the duty of the Circuit Court below to have followed and applied the law as laid down in this decision?

V.

Two former actions filed to recover on the same and identical securities having been voluntarily dismissed by the plaintiffs therein prior to the time the present action was filed, do not such dismissals operate as an adjudication of the issues on the merits, as prescribed by Rule 41-(i) and Rule 86, of the rules of civil procedure for the District Courts of the United States (effective September 18, 1938)?

REASONS RELIED UPON FOR ISSUANCE OF WRIT.

1. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law and of widespread general interest in a way directly in conflict with the applicable local decisions of the state courts of Indiana, and in a manner having no support whatsover in judicial precedent.

We refer to its action in refusing to follow the Indiana law and the construction of its courts placed upon its foreign corporation act, in that it refused to recognize and adopt the decisions of such state courts placing the true constructions on such act.

2. Likewise the Circuit Court of Appeals for the Seventh Circuit has rendered a decision in this case on an important question of local law directly in conflict with the decisions of several other circuit courts of appeals, on the question of the duty of a federal court to follow and apply the local state law, in cases wherein no federal statute or question was involved, and in particular in the cases and in the circuits following, to-wit:

(a) Fourth Circuit:

*Allison* v. *Gt. Atl. & Pac. Tea Co.* (1938), 99 Fed. (2) 507.

*Coca-Cola Bottling Co., etc.* v. *Munn* (1938), 99 Fed. (2) 190.

(b) Fifth Circuit:

*Terrell* v. *Gary* (1938), 98 F. (2) 14.

*Eppenhauer* v. *Ohio Oil Co.* (1938), 524.

(c) Sixth Circuit:

*McCrate* v. *Morgan Packing Co.* (1941), 117 F. (2) 702.

*Consolidated Coal Co.* (1940), 113 F. (2) 813.

(d) Eighth Circuit:

*Ft. Dodge Hotel Co.* (1941), 119 F. (2d) 253.

*Yoder* v. *Nu-Enamel Corp.* (1941), 117 F. (2) 488.

(e) And in conflict with decisions in its own circuit, among them:

*Gorney* v. *Trustees, etc., Orphans' Board* (1937), 93 F. (2) 107.

*Toomey* v. *Toomey* (1938), 98 F. (2) 736.

3. The Circuit Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision, in that (a) the opinion in the present case holds that the dismissals of the two former actions brought upon these same securities does not constitute an adjudication upon the merits of such issues, as provided by Rule 41, a-1, in conjunction with Rule 86, of the rules of civil procedure in the District Courts, and (b) by conceding it is its duty to follow the State statutes and decisions, but then holding it is governed by other decisions of the state courts, which are not in fact the true interpretation of the law relative to the matter in question.

As a more ready and convenient reference, we affix hereto an appendix, containing the pertinent sections of the Indiana statutes governing foreign corporations for the period of time in question, the opinion of the Circuit Court below rendered in the present case, and the same court's opinion in the Kane case, excepting the part thereof dealing with questions not in point herein. This latter opinion is appended for the reason the court made its decision in our case upon its authority.

A duly certified transcript of the record of this cause, as filed in the United States Circuit Court of Appeals for

the Seventh Circuit, together with a certified copy of the essential proceedings in, and the disposition made by that court of this action, is furnished and lodged in the office of the Clerk of this Court in compliance with Rule 38 of the rules of this court, concurrently with the filing of this petition, and all done within three months from March 27, 1941, the date our petition for a rehearing in this cause was overruled by the Circuit Court below (R. 137).

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of, and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding it to certify and to send to this court, for its review and determination, a full and complete transcript of the record and all the proceedings had and determined in the cause numbered and entitled on its docket as Number 7455, *Reconstruction Finance Corporation, a corporation, Appellant,* v. *Fred Barnett, et al., Appellees;* and thereupon that the said opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be in all things reversed and set aside by this Honorable Court. And your petitioners also pray for such other and further relief in the premises which the court may deem meet and just.

FRED BARNETT and
EDNA M. BARNETT,
*Petitioners,*

By DOMINIC P. SEVALD,
FRED BARNETT, and
JESSE W. MCATEE,
*Their Counsel.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

**Summary of Argument,**
**Citation of Authorities,**
**Argument.**

I.

By the terms of the corporation laws of Indiana, a foreign corporation failing to obtain a license as such is forbidden, as a penalty, the use of its courts. If it ceases to exist without having complied, then any rights it ever had are forever barred, even in the hands of its successor, assignee or pledgee.

*Barnett* v. *Central Republic Bank and Trust Co.* (1935), 100 Ind. App. 495; 196 N. E. 369.

*Swing* v. *Toner* (1912), 178 Ind. 102; 96 N. E. 946.

*Lowenmeyer* v. *National Lumber Co.* (1919), 71 Ind. App. 458; 125 N. E. 67.

*Burroughs* v. *Southern Colonization Co.* (1930), 96 Ind. App. 93; 173 N. E. 716.

*Swing* v. *Wellington* (1909), 44 Ind. App. 455; 89 N. E. 514.

*Wiestling* v. *Warthin* (1391), 1 Ind. App. 217; 27 N. E. 576.

2 Burn's R. S. Ind. 1926, Secs. 4909 and 4918.

II.

The making of such contracts, without complying with this law, was an unlawful act by such corporation, and is against the public policy of the State of Indiana.

Indiana Foreign Corporation Act of 1913.

2 Burn's R. S. Ind. 1926, Sec. 4923.

*Peter & Burghard Stone Co.* v. *Carper,* (1933) 96 Ind. App. 554 (at p. 577), 172 N. E. 319 (at p. 327).

III.

The note and mortgage in question are not enforceable in the State courts of Indiana, and cannot be enforced in the federal courts. The Federal Court must and will accept, adopt and apply the Indiana Statutes and the decisions of its courts of appeals the same as though the Federal court were sitting as a State court.

*Erie Railroad Co.* v. *Tompkins,* (1938) 304 U. S. 64; 82 L. Ed. 1188; 58 Sup. Court Rep. 817.

*Barnett* v. *Central Repub. Bank & Tr. Co.,* (1935) 100 Ind. App. 495; 196 N. E. 369.

*Equitable Life Insurance Co.* v. *Halsey Stuart & Co.,* (Mar. 1941) ..... U. S. .....; 85 L. Ed. 631.

*Wichita Royalty Co.* v. *City Natl. Bk. of Wichita Falls,* (1939) 306 U. S. 103; 83 L. Ed. 383; 59 Sup. Ct. Rep. 420.

*Ruhlin* v. *New York Life Ins. Co.,* (1938) 304 U. S. 202; 82 L. Ed. 1290, 58 Sup. Ct. Rep. 860.

*West* v. *Am. Telegraph & Tel. Co.,* (1940) ..... U. S. .....; 85 L. Ed. 146.

*Rosenthal* v. *New York Life Ins. Co.,* (1938) 304 U. S. 263; 82 L. Ed. 1330; 58 Supreme Ct. Rep. 874.

*New York Life Ins. Co.* v. *Jackson,* (1938) 304 U. S. 261; 82 L. Ed. 1329; 58 Sup. Ct. Rep. 871.

*Hudson* v. *Moonier,* (1938) 304 U. S. 397; 82 L. Ed. 1422; 58 Sup. Ct. Rep. 954.

*Gorney* v. *Trustees, etc., Orphans' Board,* (1937) 93 Fed. (2) 107.

*Russell* v. *Todd,* (1940) 309 U. S. 280; 84 L. Ed. 762, 60 Sup. Ct. Rep. 527.

*Breisch* v. *Central R. R. of N. J.,* ..... U. S. ....., 85 L. Ed. 599 (Mar. 1941).

IV.

The decision of the Indiana Appellate Court in *Barnett* v. *Central Republic Bank & Trust Co.,* 100 Ind. App. 495, reversing the judgment rendered in the Porter Circuit Court, became and is the law of the case, which a state court of Indiana, or a federal court, on a re-trial or on a second appeal thereof, must follow and apply.

*Town of Walkerton* v. *New York, C. & St. L. Ry. Co.,* (1939) 215 Ind. 206, 18 N. E. (2) 799, (certiorari den. 60 Sup. Ct. Rep. 75, 308 U. S. 556, 84 Law ed. 467).

*Foudray* v. *Foudray,* (1913) 54 Ind. App. 164; 101 N. E. 679, (transfer den. 1913).

*Wichita Royalty Co.* v. *City National Bank of Wichita Falls,* (1939) 59 Sup. Ct. Rep. 420, 306 U. S. 103, 83 Law ed. 383.

*West* v. *Am. Telephone & Tel. Co.,* (Dec. 1940) ..... Sup. Ct. Rep. ....., 85 Law ed. 146.

*Rosenthal* v. *Rambo,* (1905) 165 Ind. 584.

*Stoner* v. *N. Y. Life Ins. Co.,* (1940) ..... U. S. ....., 85 L. ed. 275.

V.

Where voluntary dismissals of two separate and former actions are made by the plaintiff, and covering the same subject matter, prior to the time of filing the present suit, the rule of this court on such dismissals may be applied if the court deems the facts and circumstances justify it, and the court may find and adjudge such two dismissals constitute an adjudication against plaintiff upon the merits of the action.

Rule 41, (1), and Rule 86, of the Rules of Civil Procedure for the U. S. District Courts, effective Sept. 18, 1938.

## ARGUMENT.

MAY IT PLEASE THE COURT:

We here present the record of a case once tried and determined in a state court. The same subject matter is now before this court for review, coming up in a later action, asking the identical relief—the foreclosure of the same mortgage.

The right to enforce recovery on these securities, the effect of pleading as a defense the noncompliance by the first owner with the foreign corporation act, and the effect of the proceedings in this state court action, and other proceedings, as a defense interposed in the federal court are presented for consideration, and which we discuss in the order stated in the five preceding propositions.

### I.

> By the terms of the corporation laws of Indiana, a foreign corporation failing to obtain a license as such is forbidden the use of its courts. If it ceases to exist without having complied, then any rights it ever had are forever barred, even in the hands of its successor, assignee or pledgee.

This foreign corporation act, as we refer to it herein, in common with those of most of the states, includes as one of its penalties for noncompliance with its provisions, a refusal to allow a violator the use of the state courts for any legal redress. Should such corporation file an action in a state court, the defendant could plead abatement for its failure to obtain the license. This plea would be good unless plaintiff would then properly procure its license, whereupon it could proceed with its suit. Thus the abate-

ment is only a temporary bar to the action. If, however, after exercising its corporation functions in the state without this statutory permission, it ceases to exist, by reason of insolvency, merger dissolution, or by any other means, then neither its legal representative, its assignee or other transferee can maintain the action. The theory of this Indiana law is that the contract of the corporation never had any legal existence, but it could have been legalized by the corporation complying with the act, the contract could be enforced. If no compliance was ever made, and none could ever be made, then an action on the obligation is barred. This distinction in the two situations has been consistently maintained through the various decisions of the Indiana Courts. Apparently the confusion arising is due to misinterpretation of these holdings.

*Swing* v. *Toner*, 178 Ind. 102, is the leading case in point, wherein the court had before it the defendant's answer alleging that plaintiff trustee's insurance company (an Ohio corporation) at the time it issued the policies of insurance in question, "had not complied with any of the laws of this State providing the conditions under which foreign insurance companies may transact their business of insurance here; that it never afterwards so complied, and that it had been disincorporated and rendered incapable of ever so complying with such laws" (p. 103). The appellant contended that the failure of the insurance company to so comply did not render its contracts void, but only suspended its right to enforce them until it did comply, and that the matter pleaded in this answer was only abatement. Counsel on both sides argued the question whether this failure on the corporation's part rendered its contract invalid or merely suspended enforcement until such compliance was made. The court said (p. 104):

> "We are not constrained to rest the decision of the question involved in this case on the determination of the above issue between counsel, for it is not neces-

> sarily involved therein. If the above stated position of appellant's counsel, is correct, it does not follow that the facts pleaded in the fifth paragraph of answer constitute matter in abatement and not in bar. If the insurance company in question was a solvent and going concern, so that it might subsequently comply with our laws, it would be matter in abatement only, if the decisions cited by counsel are to be followed. But the company became insolvent and was disincorporated—its life has been taken away by the state that created it. It is plain that it can never comply with the laws of our State."
>
> "As these contracts cannot be enforced in our courts until such compliance, and as this can never be, the rights under them are not merely suspended, they are barred."

In *Burroughs* v. *Southern Colonization Co.*, 96 Ind. App. 93, the trial court sustained a demurrer to an answer to the complaint. The answer set up a noncompliance by a foreign corporation with this Act, setting forth that the corporation was placed in the hands of a receiver and was no longer existing, and the question there raised was whether the contract of this company was void or voidable. The court stated (p. 104):

> "Whether, however, the contract involved is void or not can make no difference under the facts averred in this paragraph of answer. It is to be observed that it is averred therein that appellee was a foreign corporation and had not qualified and could not qualify in Indiana on account of its having been put in the hands of a receiver."

This answer was held good, and it was error for the trial court to sustain it.

In the *Lowenmeyer* case (71 Ind. App. 458), the court said (at p. 466):

> "Appellant contends that, even if it should be held that the purchase of said real estate was the transacting of business within the meaning of Par. 4085, *supra*, still this would not affect his right to maintain

the action. He bases this contention on the fact that the contract in question is not void, and asserts that he, being an assignee thereof before breach, may enforce the same, notwithstanding any failure on the part of such foreign corporation to comply with the statute under consideration. We cannot concur in this contention. It is well settled in this state that, when a foreign corporation has failed to comply with a statute giving it a right to transact business in this state, and becomes insolvent, a receiver or trustee appointed to administer its affairs cannot maintain an action brought in this state on a claim arising therein; and that, where such corporation reaches a state that prevents a compliance with such statute, the facts with reference to its noncompliance and condition may be pleaded in bar to the action (citing cases). It is thus made apparent that appellant, as assignee of the contract in suit, cannot assert any right thereunder which could not have been asserted by the foreign corporation through which he claims."

The Circuit Court below relied upon *Peter & Burghard Stone Co.* v. *Carper,* 96 Ind. App. 554, for the correct interpretation of the foreign corporation act, by an Indiana court. We assert its opinion is not the correct construction of the act. The opinion is lengthy, but owing to the importance of a proper construction, we beg the court's indulgence to allow us to extend our comments upon it. The Stone Co., a foreogn corporation, made a contract with one Klausman, the general contractor, under which it furnished the material and labor necessary to install the marble work on a bank building in Marion, Indiana, all being done without the company registering under this corporation act. After it completed the work the Stone Co. did comply with the act, and then filed its action (to recover compensation), as a claim against the Estate of Carper, the decedent having been a surety for Klausman, who had become insolvent. Here we have a live corporation itself prosecuting its own action. Carper's executrix

filed a plea in abatement, setting up that at the time the contract was made and the work was done, the Stone Co. had not complied with the act, and that by its failure it could not maintain an action upon its claim. Upon demurrer, this plea was held good, and upon judgment to that effect, the record was before the Appellate Court for review. The question presented is stated (p. 557):

> "Can a foreign corporation, which has made a contract and transacted business thereunder in this state by furnishing material and labor for the construction of a building before compliance with the statute relative to foreign corporations, upon subsequent compliance with such statute, maintain an action in a court of this state to recover for such material and labor?"

In the course of the opinion these various state statutes imposing conditions are divided into three classes, namely (p. 577):

> "The statutes imposing conditions upon foreign corporations may be divided into three classes: (1) Those declaring contracts of such corporations as fail to comply with the law void; (2) those declaring that such corporations shall do no business in the state without complying with the terms of the statutes, without declaring any penalty for failure to comply with the statute; and (3) those declaring certain penalties for failure to comply with the statute."
>
> "Contracts made in violation of the first and second classes are void."

According to this classification we would come under class 2, for by Section 4923 Burn's R. S. Ind., 1926, it is provided:

> "It shall not be lawful for any foreign corporation to transact business in this state until it has filed with the auditor of state a certified copy of a vote or resolution of its board of directors consenting that service of process in any action against it may be served upon the auditor of state in Indiana and agreeing that any process so served shall be of the same legal force and validity as if served upon such corporation and agree-

> ing that such service may be made with such effect while any liability remains outstanding in this state against such corporation." (See Appendix.)

This is taken from the Act of 1913, and which has no provision inflicting penalty for a violation. It makes the attempt to transact business before compliance unlawful, without the penalty clause. Thus under this very decision which the Circuit Court below claims it is decided that non-compliance does not render the contract void, it gives us a classification whereby respondent's securities are declared void. But this is not the only inconsistency contained in this opinion, for it does recognize the fact that the contracts of a non-existing corporation cannot be enforced. We quote from pages 598-9:

> "Some confusion seems to have arisen as to whether the failure of a foreign corporation to comply with the statute in question must be pleaded in abatement, or whether it can be set up in bar * * *. The correct rule appears to be stated in *Swing* v. *Toner* (1912) 178 Ind. 102, where the court, quoting from 1 Chitty, Pleading (16th Am. Ed.) par. 462, said: 'Whenever the subject-matter of the plea or defense is that the plaintiff cannot maintain any action at any time whether present or future in respect of the supposed cause of action, it may and usually must be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is *forever* concluded, should in general be pleaded in abatement."

Thus we observe that while the learned judge in writing his opinion is reluctant to state the contract is void, yet he does concede that as to the non-existent corporation it is a plea in bar. And for his authority he quotes from *Swing* v. *Toner*, the Lowenmeyer case and the Wiestling case, three of the leading cases which we claim are the proper authority on this act.

So we can reasonably conclude that after all there is harmony among these four decisions. We have always main-

tained this position. We did so on oral argument of the state court case before the Appellate Court in 1935; we stated the same position in our briefs and in our oral argument before the Circuit Court below. Thus in the Stone Co. case the validity of the contract is not the deciding factor. It is finally stated that if the corporation can and does comply, its contract becomes enforceable; and it is also conceded that where, as in the present case, the corporation has become non-existent, recovery on its contract is barred. And if it is barred it is immaterial whether it is valid or invalid, just as stated in the Swing-Toner case.

That part of this opinion holding that an action on the contract may nevertheless be prosecuted in the federal court is pure *dicta*. No state court or state legislature can create, confer, define or limit federal jurisdiction or federal procedure. Here we have the unfortunate situation in which the Circuit Court below, in passing upon the effect of a non-existent corporations contract, relies for its authority, upon a decision which involves only the right of a live corporation to itself enforce its contract, and that very decision itself concedes that there is a marked distinction between the rights of each, the contract of one can be enforced, the other is barred.

The decision in the Stone Co. case did not even attempt to say that a recovery could be had where the corporation without complying became non-existent; neither is there any other Indiana authority to this effect. Therefore the position of the Circuit Court below is not sound. On the other hand there are numerous authorities to the effect that recovery is barred.

The Circuit Court below refers to the case of *Selph* v. *Illinois Pipe Line Co.*, 206 Ind. p. 490, as confirming the decision in the Stone Company case, but that cannot give them much comfort. The facts in the Selph case show the Pipe Line Company came into the state and constructed a pipe line across appellant's land, but a few weeks later it did

comply with this foreign corporation law by filing the necessary documents, and further, the Pipe Line Company was not the plaintiff in the case. Selph brought his action to quiet title against the Pipe Line Company, and contended that the contracts he made with the company were void on account of their noncompliance with this foreign corporation law. The court held that their subsequent compliance made the contracts valid. This is good law, and with it we agree. The point we raise is, that this, like the Stone Co. case, is one where the corporation is still alive and has put itself in a condition to lawfully transact business in the state and this case is not a good authority to rely upon in passing upon the question of a contract made by a corporation that went out of existence without complying.

## II.

The making of such contract without complying with the act, was an unlawful act by such corporation, and which is against the public policy of the State of Indiana.

This Section 4923 is an act of the 1913 Legislature, passed six years after the other sections of this act became effective. It is apparent the legislature deemed the same a necessary supplement to some of the other sections already in force, as it provides for further duties and restrictions, which no doubt experience in applying revealed a necessity therefor. It provides (See Appendix p. 37):

> "It shall not be lawful for any foreign corporation to transact business in this state until it has filed with the auditor of state a certified copy of a vote or resolution of its board of directors consenting that service of process in any action against it may be served upon the auditor of state in Indiana * * *."

By declaring "it shall not be lawful for the corporation to transact business, etc.," without a penalty, it is placed

in class two of the classification defined in the opinion in the Stone Co. case and whereby contracts made in violation of this class are held to be void, and to which fact we have heretofore made reference.

## III.

The note and mortgage in question are not enforceable in the state courts of Indiana, and cannot be enforced in the federal courts. The federal court must and will accept, adopt and apply the Indiana statutes and decisions of its courts of appeals the same as though the federal court were sitting as a state court.

While we have cited quite a number of authorities in support of this proposition, we will not attempt to elaborate upon them. In other parts of this brief we comment from the well known and understood case of *Erie R. Co.* v. *Tompkins*, and likewise from the Wichita Royalty case. The remaining cases, with one exception, are recent expressions from this court, and all in line with the very sound theories and principles of law contained in the Erie case opinion.

It is conceded no recovery can be had on the note and mortgage in question in the state court. The decision of the Appellate Court in the Barnett case settled the law involved. Plaintiff in the present action in its complaint admits no recovery can be had in the state court by virtue of this decision (R. 8).

This is an action *in rem*, and consequently, the subject matter of the suit is the same regardless of who is the owner of the securities. If this Appellate Court decision held that the plaintiff in that case could not recover on account of the disability of the original owner and holder, The Chicago Trust Company, then the same securities have no legal force in the hands of any subsequent owner.

So whenever they are exhibited in any action as a basis for recovery, the same defense is good. This appeal settled the law to the effect that this answer in question was a good defense in bar to an action on the note and mortgage. The opinion did not state that any certain plaintiff was prevented from bringing an action. It goes deeper than that. It holds that a recovery upon the note and mortgage, regardless of its owner, is barred.

Now the question remains, if the state court bars a recovery, is a recovery in the federal court likewise barred? Since the decision in Erie R. Co. *vs.* Tompkins there can be no doubt upon the proposition that where plaintiff cannot prevail in the state court for reasons going to the merits of his case on account of the state law or its decisions, the federal courts will put themselves in the same position and will likewise bar a recovery. In fact, this was the law and the rule prior to the decisions in the Erie case, and had been most generally applied. It is now universally agreed that there is no reason for a dual system of law—one in the state court and the other in the federal court. And further than this, there had never been any question about the federal court following the state law in actions named as purely local, such as those enforcing liens, or real estate actions brought to determine or declare title in land, and others of a similar nature. The foreclosure of a real estate mortgage is altogether of a local nature. In fact, the holder of a mortgage looks to the state law for his protection, such as are afforded by its recording laws, the statutes governing the execution of the mortgages, their foreclosure, redemption therefrom, and in case of no redemption, then defining his rights to obtain a title to the real estate under his decree of foreclosure. So, if all of these things are of a local nature, the action is local, and there can be no excuse for a federal court refusing to follow the state law, because the federal court can have no interest different from that of the state court. Even in the

event plaintiff should finally recover in this action and follow his foreclosure to the end by having a sale of the premises to satisfy its judgment, and in case of failure of redemption, to obtain a deed on his decree, the validity of this deed and the rights of the defendants to redemption are all governed by the state law. Therefore, there can be no right, or interest, or remedy other than which is given by the state in an action to foreclose.

If the federal court could adopt its own law in the premises, an arbitrary abuse would be present. The same defendant could be taken into court by the same plaintiff, in the federal court on a $3000.00 mortgage and in the state court on a $2,999.00 mortgage, both alike in their substance. In the state court he would have a defense given by the state law, which would defeat a recovery. Yet, in the federal court he would lose if the federal court is not required to follow the same law.

## IV.

> The decision of the Indiana Appellate Court in *Barnett* v. *Central Republic Bank and Trust Co.*, 100 Ind. App. 495, reversing a judgment rendered in the Porter Circuit Court, became and is the law of the case, which a state court of Indiana or a federal court on a retrial on a second appeal thereof must follow and apply.

We cite three Indiana cases under this proposition, all of which are in accord on this proposition. In the Foudray case it is stated:

> "It has been uniformly held in this state that a judgment upon appeal rules the case on a subsequent appeal involving the same questions."

And in the Town of Walkerton case the court said:

> "Appellant is correct in its claim that the former decision is to be regarded as the law of the case so far

as it is determinative of the matters therein considered."

And the Rosenthal case recites the same proposition.

In the Wichita Royalty Co. case, it is stated (p. 107):

> "In departing from the 'law of the case,' as announced by the state court, and applying a different rule, the court below correctly stated that by reason of the removal it had ben substituted for the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause had not been removed. It was the duty of the federal court to apply the law of Texas as declared by its highest court." Citing *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

The opinion in *Stoner* v. *N. Y. Life Ins. Co.* (1904), 85 L. ed. 275, clearly expresses the law on this point. We quote from page 277:

> "We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of Erie R. Co. *vs.* Tompkins * * * must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently (citing West *vs.* Am. T. & T. Co., and two other cases recently decided). In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review."
>
> "Twice the Kansas City Court of Appeals has had before it appeals involving the same parties, insurance contracts, and facts as are involved here * * *. Each time respondent argued that petitioner's evidence failed to present a submissible case * * *. Each time the Kansas City Court of Appeals expressly stated that the evidence as to total disability presented a question for the jury."

In *Eppenauer* v. *Ohio Oil Co.*, (1938) 98 F. (2) 524, the District court below entered a decree quieting plaintiff's

title to certain tracts of land. The action was brought to determine and establish boundary lines. The Texas Supreme Court, in a former action, after considering the various conflicting surveys, fixed the correct boundary lines on the ground. The opinion states that by virtue of this action the Texas court had validated plaintiff's title, and under the doctrine of *stare decisis* obtaining in Texas all parties thereafter claiming vacancies in conflict with this decision are bound by it whether parties to the suit or not, and that such was the settled law of Texas which the Fifth Circuit Court felt bound to follow.

Following these authorities, only one conclusion can be reached, and to the effect that the proceedings in the state court cases fully decided the issues involved in petitioner's favor. Then the plaintiff dismissing these, fully set the matter at rest. This case was rightfully decided by the trial court below, who recognized this former litigation as determinative of the present case.

## V.

> Where voluntary dismissals of two separate and former actions are made by the plaintiff, and covering the same subject matter, prior to the time of filing the present suit, the rule of this court on such dismissals may be applied if the court deems the facts and circumstances to justify it, and the court may find and adjudge that such two dismissals constitute an adjudication against plaintiff upon the merits of the action.

This present action was pending in the District Court below when the rules became effective (September 18, 1938). Rule 86 provides they will govern pending causes excepting where in the opinion of the court their appli-

cation in a particular action pending when the rules took effect would not be feasible or would work injustice. But that circumstance could not be present in this case. In fact, it is quite apparent this proposition in Rule 41 concerning two dismissals was made to prevent conduct like that of the owner of these securities. The first plaintiff voluntarily chose the state court for its forum. It had the choice of either the state or federal court. Then as a matter of precaution, it filed an action in the federal court below. One week after obtaining its judgment in the state court it voluntarily dismissed the one pending in the district court below. Now, it must have reasoned, that having procured a judgment in the state court, it would rely upon such recovery. But when the latter was reversed by the Appellate Court, it knew further proceedings in the state court would be futile, so back into the federal court it comes with the present case. Respondents have been compelled to defend in three separate actions when one would have been sufficient. It is quite obvious plaintiff-respondent is asking the federal court to grant it a relief the state court has refused to give.

While this question in itself would scarcely justify this court's intervention, nevertheless it is present; therefore we bring it to the court's attention for consideration as to whether the Circuit Court below made the proper application of the rule. It certainly is a matter wherein this court has the right to exercise its supervisory powers over proceedings below.

## Conclusion.

This note and mortgage have been in litigation for ten years. The matter in controversy should be set at rest. No Indiana decision holds that a recovery can be had where the corporation involved has ceased to exist. On the other hand, the authorities we quote are to the effect that the contract of a non-existent corporation under circumstances like those present are definitely barred. If the opinion of the court below could have rested on one decision holding that such a contract could be enforced, the situation might be different. We trust we have clearly shown that the Stone Co. case is no anchor in the storm. The assertion that the contract in question is legal is not a sufficient justification to allow the federal court to foreclose the mortgage. The owner of the securities itself created the situation whereby the Appellate Court decision was rendered. It first invoked the aid of the state court. Now its successor wants to repudiate that court.

We have set forth several authorities from the different Circuit Courts in support of our assertion that the Seventh Circuit in the present case has made a decision out of line with those in these other circuits. In all of those cases the courts have expressed a willingness to follow the spirit and the letter of this doctrine relative to applying the state law. We therefore, in the cause of brevity, will omit quotations therefrom.

We sincerely believe the Seventh Circuit Court of Appeals has wholly disregarded the Indiana law and the proper decisions of its courts by its failure to recognize and follow the law and upon a subject matter completely local in all respects, and in a matter of very serious importance to all our citizens.

We therefore respectfully assert that the present case is one requiring the supervisory powers of this court over

the judgments and decrees of the Circuit Courts of Appeal. To the end that the errors committed by the Seventh Circuit Court of Appeals, as herein set forth, may be corrected; and that petitioners may be granted the rights to which they are entitled under the laws of the State of Indiana, we therefore pray that a writ of certiorari be granted, and whereby this court may review the decision of the Seventh Circuit Court of Appeals in question, and finally reverse it.

Respectfully submitted,

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# APPENDIX.

Sections 4909, 4910, 4913, 4918 (Acts 1907, p. 286), and Section 4923 (Acts 1913, p. 60), Burn's R. S. Indiana, 1926.

4909. Admission to State.—Before any foreign corporation for profit shall be permitted or allowed to transact business or exercise any of its corporate powers in the State of Indiana, other than insurance companies, building and loan companies and surety companies, they (it) shall be required to comply with the provisions of this act and shall be subject to all the regulations prescribed herein, as well as all other regulations, limitations and restrictions applying to corporations of like character organized under the laws of this state.

4910. Application to Secretary of State, Contents.—When any corporation organized under the laws of any foreign state, territory or country for the transaction of business for profit desires admission into the State of Indiana for the purpose of transacting business or exercising its corporate powers or franchise, it shall make application to the secretary of state, signed and sworn to by the president and secretary, stating what business such corporation proposes to pursue in Indiana under its articles of incorporation; the amount of capital stock of such corporation, * * * the proportion of its business, based upon its total business for the year immediately preceding, carried on in the State of Indiana, or if a newly organized corporation, then the proportion, as nearly as can be determined by estimate, to be transacted in Indiana; the amount paid in upon its capital stock; what property and assets and an estimate of the value thereof to be employed in the business of said corporation in the State of Indiana; * * * the names of the president, secretary and directors of said corporation and their residences; where its principal office in Indiana will be located, and the name and address of some agent or attorney in fact upon whom service of process can be had in all suits

commenced in this state, and such corporation shall file with the secretary of state a copy of its charter or articles of incorporation, or in case such corporation is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly certified and authenticated by the officer who issued the original, or by the recorder or registrar of the office in which said original charter, article or certificate may have been recorded.

4913. Location of Office and Name of Agent for Service of Process.—Each foreign corporation admitted to do business in this state under the provisions of this act shall constantly keep on file in the office of the secretary of state an affidavit of the president and secretary showing the location of its principal business office in the State of Indiana, and the name of some person who may be found at said office for the purpose of accepting service upon said corporation in all suits that may be commenced against it, and as often as said corporation shall change its location, or its agent or attorney in fact for receiving and accepting service, a new affidavit shall be filed to take place of all such affidavits previously filed by the officers of said corporation.

4918. Penalties—Prosecutions.—Every foreign corporation amenable to the provisions of this act, which shall neglect or fail to comply with any of the provisions of the same, as herein provided, shall be subject to a penalty of not less than one thousand ($1,000.00) dollars, nor exceeding ten thousand ($10,000.00) dollars, to be recovered before any court of competent jurisdiction, and it is hereby made the duty of the secretary of state, as he may be advised or may ascertain that any corporation is doing business in contravention of this act, to report such fact to the attorney-general, and it shall be the attorney-general's duty, and the duty of the prosecuting attorney of the proper county, to bring such action at law as shall be necessary for the recovery of the penalties imposed hereby, and, in addition to such penalty, if, after this act shall take effect, and foreign corporation shall fail to comply herewith, no suit may be maintained, either at law or in equity, upon any claim, legal or equitable, whether arising out of contract or tort, in any court of this state.

4923. Process—Consent to Service.—It shall not be

lawful for any foreign corporation to transact business in this state until it has filed with the auditor of state a certified copy of a vote or resolution of its board of directors consenting that service of process in any action against it may be served upon the auditor of state in Indiana and agreeing that any process so served shall be of the same legal force and validity as if served upon such corporation and agreeing that such service may be made with such effect while any liability remains outstanding in this state against such corporation.

OPINION IN RECONSTRUCTION FINANCE CORPORATION V. BARNETT, ET AL., U. S. CIR. CT. OF APPEALS, 7TH CIRCUIT, 118 F. (2D) 190.

SPARKS, *Circuit Judge.*

This appeal involves the right of appellant, the assignee of a note secured by trust deed on real property, to bring suit in a federal court in Indiana to foreclose on the trust deed upon default in payment of principal and interest, such action being admittedly barred in the state courts of Indiana for failure of the mortgagee to comply with the applicable statutes relating to requirements for admission of foreign corporations to do business in that state. See Burns Indiana Statutes, Secs. 4909 and 4918. A foreclosure suit had previously been brought in a state court, and a decision in favor of the mortgagee in the trial court was reversed by the Appellate Court on the ground that the mortgagee had failed to comply with the Indiana statutes, and, having ceased to do business and been consolidated with another corporation in the meantime, it could never comply with the applicable statutory requirements. See *Barnett* v. *Central Republic Bank*, 100 Ind. App. 495, 196 N. E. 369. Upon suit in the federal District Court on the same note and trust deed, that court held that since the action was barred in the state courts, the assignee of the note and mortgage could obtain no greater relief in the federal court, hence denied the relief sought.

Substantially the same question was presented in *Metropolitan Life Ins. Co.* v. *Kane*, 117 F. (2d) 398, decided by us January 30, and we there held that under applicable

decisions of the courts of Indiana, the fact that the note and mortgage there involved were unforceable in the state courts did not render them unenforceable in the federal courts. The only difference between the facts of that case and the one at bar appears to be that while in the Kane case the note and mortgage were transferred before maturity, in the case at bar, the transfer was after default. We are convinced that this distinction is without significance. We also hold Rule 41 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, pertaining to the effect of dismissal of actions, inapplicable, both dismissals referred to by appellee having taken place prior to the effective date of the New Rules.

The decree of the District Court is reversed on the authority of *Metropolitan Life Ins. Co.* v. *Kane*, *supra*, and cases therein cited.

OPINION IN METROPOLITAN LIFE INS. CO. V. KANE, ET AL., (1941) U. S. CIR. CT. OF APPEALS, 7TH CIRCUIT, 117 F. (2D) 398.

MAJOR, *Circuit Judge*.

This is an appeal from a judgment entered December 19, 1939, foreclosing a mortgage given to secure the payment of a note in the sum of $22,500, both executed by the defendants, February 14, 1929, to the Chicago Trust Company, an Illinois Corporation, for a loan made to the former by the latter. The property described in the mortgage is located in the City of Gary, Lake County, Indiana, where the defendants then, and at the time of the institution of this suit, were residents and citizens. The loan was negotiated, the instruments in question executed, and the money delivered to the defendants at a branch office of the Chicago Trust Company in Gary, Indiana. The note and mortgage were purchased by the plaintiff on May 3, 1929, and by stipulation of the parties, the plaintiff is the holder and owner of said note and mortgage, acquired for a valuable consideration in the regular course of business. The defendants made regular payments as provided, up to June 1, 1933, and then defaulted.

At the time of the hearing there was due and owing

upon said note, the sum of $19,800 as principal, and in addition, interest and certain other items as provided for by the obligation.

The Chicago Trust Company, subsequent to the assignment of the note and mortgage, consolidated or merged with the Central Republic Bank and Trust Company, an Illinois Corporation, and the name of the latter was afterwards changed to Central Republic Trust Company, which, at a later date, was placed in the hands of a receiver for liquidation.

Neither the Chicago Trust Company, nor any of its successors, all Illinois Corporations, ever qualified, as required by the Statutes of the State of Indiana, to do business in that state. At the time of the involved transactions, and since, there has been in force in the State of Indiana, the following statutory provisions:

"Before any foreign corporation for profit shall be permitted or allowed to transact business or exercise any of its corporate powers in the State of Indiana, other than insurance companies, building and loan companies and surety companies they (it) shall be required to comply with the provisions of this act and shall be subject to all the regulations prescribed herein, as well as all other reguations, limitations and restrictions applying to corporations of like character organized under the laws of this state." Sec. 4909, Burns Annotated Statutes, 1926.

"Every foreign corporation amenable to the provisions of this act, which shall neglect or fail to comply with any of the provisions of the same, as herein provided, shall be subject to a penalty of not less than one thousand ($1,000) dollars nor exceeding ten thousand ($10,000) dollars, to be recovered before any court of competent jurisdiction, and it is hereby made the duty of the secretary of state, as he may be advised or may ascertain that any corporation is doing business in contravention of this act, to report such fact to the attorney-general, and it shall be the attorney-general's duty, and the duty of the prosecuting attorney of the proper county to bring such action at law as shall be necessary for the recovery of the penalties imposed hereby, and in addition to such penalty, if, after the act shall take effect, any foreign corporation shall fail

to comply herewith, no suit may be maintained, either at law or in equity, upon any claim, legal or equitable, whether arising out of contract or tort, in any court in this state." Sec. 4918.

Defendants' position in the court below, and here, as we understand it, is that the note and mortgage are void or nonenforceable for the reason that neither the Chicago Trust Company nor any of its successors ever qualified to do business in the State of Indiana in compliance with the above provisions and, that the Chicago Trust Company having ceased to exist, could not make such compliance. It is further the position of the defendants that the obligation being nonenforceable by the Chicago Trust Company, is likewise nonenforceable by its assignee, the plaintiff in the instant suit.

Defendants' contention that the note and mortgage are void, must, under the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, be determined by the provisions of the Indiana Statute as construed by the decisions of the courts of that state. If the obligation was void in its inception, we assume no suit could be maintained in any court, State or Federal. If, however, the contract were only nonenforceable in the State Courts of Indiana, there is the further important question as to whether it may be enforced in the Federal Court.

A number of Indiana cases are cited by the defendants having to do with the right of the State to impose conditions, such as are found in the Statutory provisions in question. It is unnecessary to consider such cases for the reason that the right or the authority of the state in this respect is not in dispute. It is the interpretation to be given such provisions and not their validity with which we are concerned. The only Indiana authority called to our attention which has held an instrument void under the circumstances here presented is *United States Construction Co.* v. *Hamilton National Bank*, 73 Ind. App. 149, 126 N. E. 866. There it was held that a failure to comply with the Statute was a misdemeanor and rendered any contract made in violation thereof, void. No further consideration, however, need be given this case for the reason that this

pronouncement was subsequently expressly overruled in *Peter & Burghard Stone Co.* v. *Carper*, 96 Ind. App. 554, 172 N. E. 319, 775. The latter case was approved by the Supreme Court of Indiana in *Selph* v. *Illinois Pipe Line Co.*, 206 Ind. 490, 190 N. E. 191.

At this point we shall give consideration to these cases and subsequently to other cases relied upon by the defendants. In the Burghard case, the suit was brought by a foreign corporation which had not complied with the involved Statutory provisions for material and labor supplied a contractor in the State of Indiana. The defendants there, as here, contended that the contract was void, and relied upon the Hamilton case in support of such contention. The Appellate Court repudiated the holding of the Hamilton case, held the contract was not void, and permitted the foreign corporation to recover upon showing that it had complied with the Statute prior to suit. In discussing the Statutory provisions, the court said (96 Ind. App. 554, 172 N. E. 325):

"* * * A foreign corporation doing business in this state without complying with the law of this state is subject to two penalties: (1) It may be forced to pay a penalty of not less than $1,000 nor more than $10,000; and (2) it may not maintain a suit in the courts of this state. The statute does not, as do the statutes of some states, declare contracts entered into by a foreign corporation before complying with the statute void, nor does it provide that no action can be maintained on such contracts. * * *

"The very fact that the prohibition against maintaining an action in the courts of the state was inserted in the statute ought to be conclusive proof that the Legislature did not intend or understand that contracts made without compliance with the law were void. The statute does not fix any time within which foreign corporations shall comply with the act. If such contracts were void no suits could be prosecuted on them in any court."

In the Selph case, it was contended that the contracts before the court were void because the plaintiff was a non-complying foreign corporation. The court held the contract not void and that the foreign corporation, upon com-

pliance with the Statute, might maintain its suit in the court of that state. The court said (page 192 of 190 N. E.): "In the Peter & Burghard Stone Co. case the court held that, although a foreign corporation enters into a contract before a compliance with the statute, this fact does not render the contract void, and if, after the execution of the contract, but before suit, the corporation complies with the statute, then an action may be maintained by the corporation upon the contract. In this case all of the cases in this state upon the question at issue were collected and considered as well as cases from many other jurisdictions. The case is well considered and reasoned, and we do not consider it necessary to dwell further upon the law as decided in that case."

It is argued by the defendants, however, that its position is sustained by later Indiana cases. Two cases in particular are cited, namely *Barnett* v. *Central Republic Bank & Trust Co.*, 100 Ind. App. 495, 196 N. E. 369, decided by the Appellate Court June 19, 1935, and *Mitchell* v. *Hart*, Ind. App., 25 N. E. (2d) 665, decided by the same court March 5, 1940. The Barnett case was an action by the Chicago Trust Company to recover on a note and mortgage executed by Indiana citizens. The defendants' plea was to the effect that the Chicago Trust Company had not complied with the Corporation Act; that it had ceased to do business as a corporation; that its assets and affairs had been taken over by its successor, and that it was in a position where it could no longer qualify. The court held that the suit was barred by reason of the Statutory provisions. There is no holding, however, that the contract was void or that the suit could not have been maintained in a court other than that of Indiana.

The Hart case had to do with an insurance contract issued by a company not authorized to do business in the State. While the court held the contract void, a different provision of the Statute was involved, and we do not see how it is material to the question before us. It is significant that neither the Burghard case, nor the Selph case is cited or referred to in the Barnett or Mitchell cases.

Other cases are relied upon by the defendants, all prior to those of Burghard and Selph, and we think there is no occasion to discuss them. A study of these cases leaves

no doubt but that a contract made in Indiana by a foreign corporation which has not complied with the Statutory provisions in question, is not void, and may be enforced in the state courts of Indiana by complying with the Statute before suit. It also appears that non-compliance may be pleaded in bar, and, as pointed out, it has been directly held that where the foreign corporation is in a situation where compliance is no longer possible, such a situation bars the action in the State Court.

Defendants' argument continues to the effect that inasmuch as the Chicago Trust Company has ceased to exist, there is no possibility of its complying with the Statute so as to maintain a suit in the Indiana court, and that, therefore, it could not maintain a suit in the Federal Court. It follows from this, so the argument goes, that the instant plaintiff, as the assignee of the Chicago Trust Company, is likewise precluded from maintaining a suit in the State Court, and that because it is denied the privilege of the State Court, it must likewise be denied the privilege of the Federal Court.

It may be material, as suggested by the plaintiff, that it is the holder of the note and mortgage in suit for a valuable consideration, and in due course, and that it therefore occupies a position different from that of the Chicago Trust Company. We are of the view that it is not necessary to discuss or decide that contention. For the purpose of decision, we think we may safely assume that plaintiff occupies the same position as that of the Chicago Trust Company. Under the law of Indiana, as already determined, the Chicago Trust Company was precluded from maintaining a suit in the Courts of that State, and it would follow that plaintiff is likewise precluded. It does not follow, however, as contended by the defendants, that because the Chicago Trust Company was barred from the Courts of Indiana, that it was also barred from the Federal Courts. In this connection, as already pointed out, it is pertinent to keep in mind that by the decisions of the Indiana Courts, the note and mortgage were not void. They were valid when received by the Chicago Trust Company, were valid when assigned by that corporation to the plaintiff, and are valid now. Their validity, in our judgment, could not be affected by the fact that the Chicago Trust

Company, subsequent to their assignment, ceased to exist as a corporate entity. That had no effect on the situation except to destroy any possibility that the Trust Company could qualify to do business in Indiana and thereby remove the barrier to its right to institute suit in the State Court.

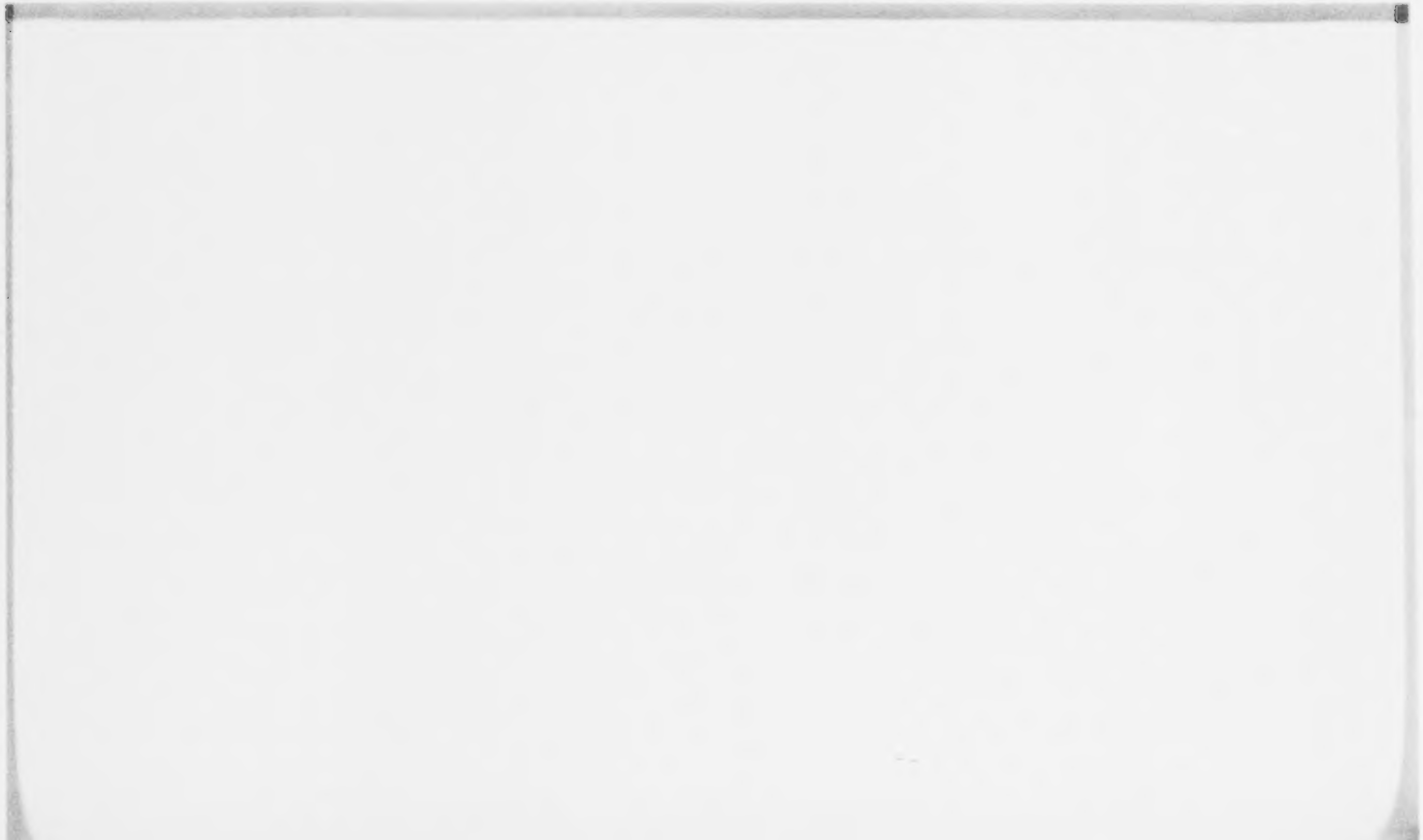
A construction of the Statutory provisions in question, as precluding a non-complying foreign corporation from suing in the Federal Court, would in our judgment, raise a serious question as to their validity. It would, in effect, impair the jurisdiction of Federal Courts, as bestowed by Congress. *Stephenson* v. *Grand Trunk Western R. Co.*, 7 Cir., 110 F. (2d) 401. We are convinced, however, that such was not the intention or purpose of the Indiana Legislature. We again revert to the Burghard case which supports such conviction. The court, page 325 of 172 N. E., said: "The general rule is that a statute which merely closes the courts of the state to a non-complying foreign corporation doing business within the state, and which does not expressly or constructively declare the contract void, does not prevent the maintenance of an action by such foreign corporation in a federal court sitting in that state, upon a contract made within the state. Nor does such a statute prevent a recovery upon such contract in an action prosecuted in some other state. This would not be true if the contract were void in the state where it was executed. Such contracts are not void, but remain valid and enforceable by suit in the federal courts or in the courts of any other jurisdiction though there has been no attempt to comply with the statute. (Citing cases)."

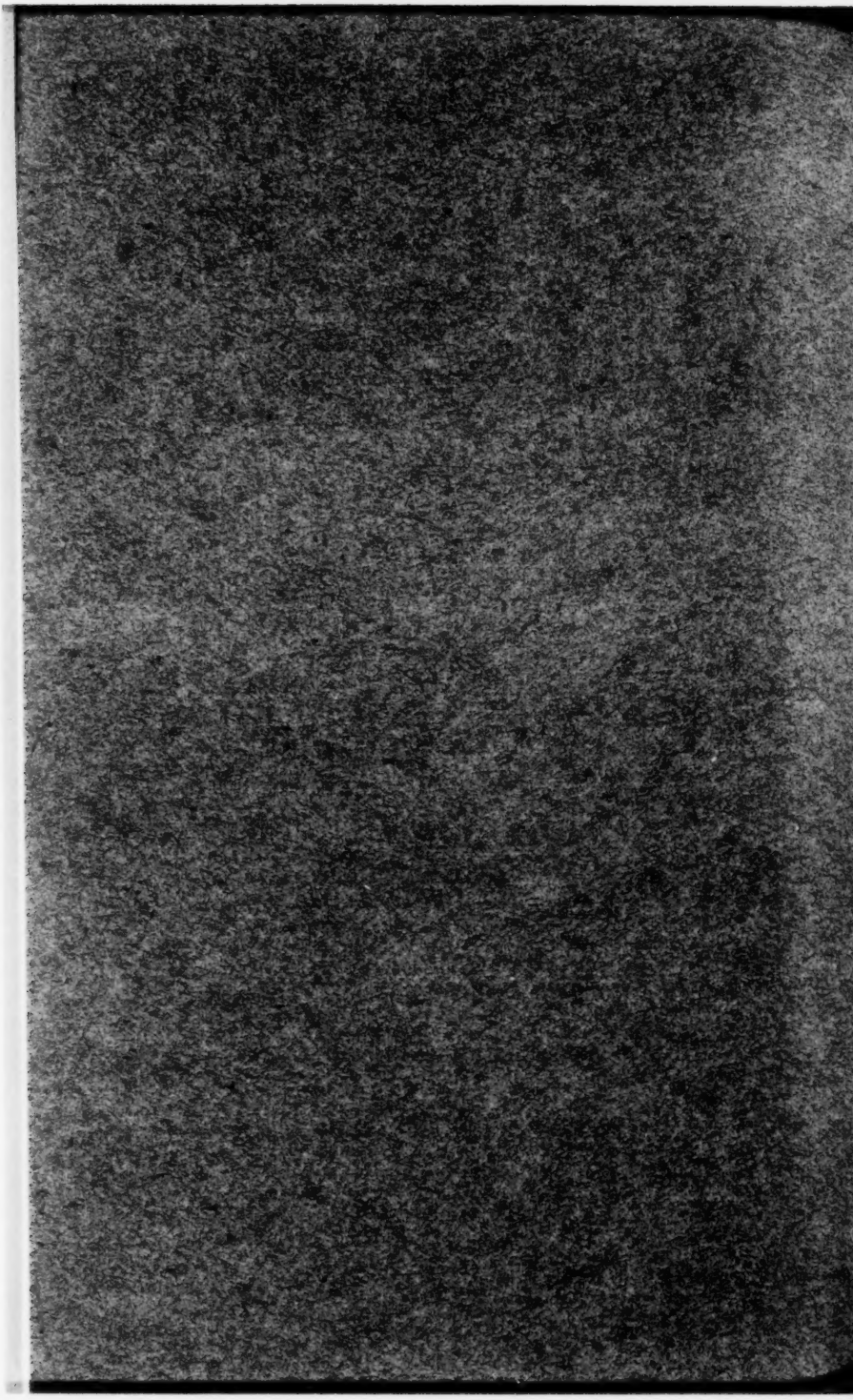
Among the numerous cases cited in support of this rule is that of *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U. S. 489, 32 S. Ct. 711, 712, 56 L. Ed. 1177, Ann. Cas. 1914A, 699, in which the plaintiff, a foreign corporation, had failed to comply with a provision of the New York Statute requiring a certificate of authority before such corporation was permitted to do business in that state. The Statute provided: "* * * No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this State unless, prior to the making of such contract, it shall have procured such certificate. * * *" The court

points out that by the decisions of the courts of that state, a contract made in violation of the Statute, is not void. The holding was to the effect that while the plaintiff was barred from maintaining a suit in the state court, it had a right to bring a suit in the Federal Court. On page 500, of 225 U. S., 32 S. Ct. on page 714, 56 L. Ed. 1177, Ann. Cas. 1914A, 699, the court said: "* * * The state could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract. (Citing cases). * * * "Defendants argue that this case should not be considered for the reason that 'the courts of the State of New York had already held that the contract was not void.' As we have already seen, the courts of Indiana have likewise construed the Statutory provisions in question which makes this case persuasive and near controlling * * *

From what we have said, we thus conclude that the note and mortgage in suit are valid obligations, and that the jurisdiction of the Federal Court was properly invoked. No fraud of any character was perpetrated upon the defendants; the money was loaned to them, they promised to pay, and have not discharged their obligation in that respect. By the law, as we construe it, they should be and are required to discharge their contractual obligation.

The decree of the District Court is therefore affirmed."





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# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 212

FRED BARNETT AND EDNA M. BARNETT, PETITIONERS

*v.*

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

### OPINION BELOW

The District Court made findings of fact and conclusions of law (R. 67–97) but did not write an opinion. The opinion of the Circuit Court of Appeals (R. 122–123) is reported in 118 F. (2d) 190.

### JURISDICTION

The decree of the Circuit Court of Appeals was entered on February 5, 1941 (R. 124). The petition for a rehearing was filed on February 19, 1941 (R. 124), and was denied on March 27, 1941

(R. 137). The petition for a writ of certiorari was filed on June 26, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

Petitioner gave a note and mortgage to a foreign corporation not authorized to do business in the state. A suit in the state court brought by this corporation, for which was substituted a successor foreign corporation, was voluntarily dismissed, after an interlocutory decision on appeal that the mortgagee's disqualification could be pled in bar. A suit by the same successor in the federal court was also voluntarily dismissed. The claim was acquired by respondent which brought suit in the federal court. The questions are:

1. Whether under state law the contract is void, or is enforceable in the federal courts.

2. Whether the state court decision governs this action as "the law of the case."

3. Whether the two earlier dismissals, each prior to the effective date of the Federal Rules of Civil Procedure, bar this suit under Rule 41 (a) (1), which was also brought prior to the effective date of the Rules.

## STATUTES INVOLVED

The applicable portions of the Indiana Foreign Corporation Act of 1907 are set forth in the Appendix, *infra,* pp. 12–13.

## STATEMENT

A note and mortgage signed by petitioners (R. 71–84) were pledged to respondent in June 1932, by Central Republic Bank and Trust Company (R. 93–94), an Illinois corporation, successor by consolidation in 1931 to Chicago Trust Company, an Illinois corporation (R. 67).

Chicago Trust Company had taken the note and mortgage from petitioners in consideration of a loan made to them at its office in Hammond, Indiana (R. 68–70), through which it made other mortgage loans, both before and after the present loan was made (R. 70–71). Neither Chicago Trust Company, nor Central Republic Bank and Trust Company, at any time complied with the Indiana foreign corporation laws (R. 68).

In 1930, upon default, a suit to foreclose the mortgage was filed in the state court in Indiana by Chicago Trust Company and Willard F. Hopkins, as Trustees under the mortgage; subsequently Central Republic Bank and Trust Company and Arthur J. Baer, as Successor Trustees under the mortgage, were substituted and filed a supplemental complaint (R. 85–88). The defendants filed an answer, alleging that the note was void because the Chicago Trust Company was not authorized to do business in Indiana. The trial court struck the answer, on a motion alleging that it was a matter in abatement and not a plea in bar. The Indiana Appellate Court reversed. *Barnett* v.

*Central Republic Bank and Trust Co.*, 100 Ind. App. 495 (R. 88–91). After remand, on November 30, 1937, the suit in the state court was voluntarily dismissed by the complainants (R. 91).

Central Republic Bank and Trust Company and another, as trustees, on March 14, 1932, had filed in the District Court a bill in equity to foreclose the same note and mortgage. On October 21, 1932, that suit was also voluntarily dismissed by the complainants (R. 92).

In November 1932, the name of Central Republic Bank and Trust Company was changed to Central Republic Trust Company. In November 1934, a receiver was appointed for Central Republic Trust Company (R. 67–68).

On January 20, 1938, the Reconstruction Finance Corporation, as pledgee, filed the present suit in the District Court to foreclose the mortgage and to recover a personal judgment upon the note (R. 3–9). After trial, the District Court entered a decree that respondent have and take nothing by or through its complaint (R. 98–102). The Circuit Court of Appeals reversed and remanded with instructions to enter a decree in favor of respondent (R. 122–124).

## ARGUMENT

1. Petitioners complain (Pet. 13, 20–28) that the court below misread or ignored the Indiana decisions construing the Indiana Foreign Corpora-

tion Act of 1907 (2 Burns Annotated Indiana Statutes, 1926 §§ 4909–4922). The court decided this case on the authority of its decision in *Metropolitan Life Ins. Co.* v. *Kane,* 117 F. (2d) 398.[1] The court in that case, relying upon *Peter & Burghard Stone Co.* v. *Carper,* 96 Ind. App. 554 (1933), and *Selph* v. *Illinois Pipe Line Co.,* 206 Ind. 490 (1934), held that Section 9 of the Indiana Foreign Corporation Act of 1907 (2 Burns Annotated Indiana Statutes, 1926, § 4918) did not render void and unenforceable in the federal courts a note and mortgage taken by Chicago Trust Company while doing business in Indiana without compliance with that Act, but merely suspended the right to maintain an action in the Indiana courts until compliance.

This holding seems plainly correct. Section 9 of the Indiana Foreign Corporation Act provides:

> * * * if, after this act shall take effect, any foreign corporation shall fail to comply herewith, no suit may be maintained, either at law or in equity, upon any claim, legal or equitable, whether arising out of contract or tort, in any court in this state.

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[1] That suit involved a note and mortgage given to Chicago Trust Company under substantially the same circumstances as occurred in the present case and differs from this case only in that Metropolitan Life Insurance Company purchased its note and mortgage from Chicago Trust Company before maturity, a circumstance which the Circuit Court of Appeals regarded as immaterial to its decision (R. 123).

In the *Carper* case, the Indiana Appellate Court, after an extensive review of the Indiana decisions, held that a contract executed in Indiana by a foreign corporation doing business there without complying with the statute, but which had complied before it filed suit, was not void, and that the fact of non-compliance merely suspended the right of the foreign corporation to maintain an action in the Indiana courts until it had complied with the statute. The court said, at page 572:

> Such contracts are not void, but remain valid and enforceable by suit in the federal courts or in the courts of any other jurisdiction though there has been no attempt to comply with the statute.

The *Selph* case presented similar facts, except that the foreign corporation was a defendant. The Supreme Court of Indiana approved the *Carper* rule. It said (pp. 492–493):

> In the *Peter & Burghard Stone Co.* case the Court held that although a foreign corporation enters into a contract before a compliance with the statute this fact does not render the contract void, and if, after the execution of the contract, but before suit, the corporation complies with the statute then an action may be maintained by the corporation upon the contract. In this case all of the cases in this state upon the question at issue were collected and considered as well as cases from many other jurisdic-

tions. The case is well considered and reasoned and we do not consider it necessary to dwell further upon the law as decided in that case.

Petitioners rely (Pet. 21–22) upon *Swing* v. *Toner,* 178 Ind. 102 (1912). But the *Swing* case did not involve the Foreign Corporation Act of 1907. The foreign corporation in that case was a mutual fire-insurance company which, by virtue of Section 1 of the Act of 1905, was subject to the provisions of the Indiana Foreign Insurance Company Act of 1877, as amended (2 Burns Annotated Indiana Statutes, 1908, §§ 4663, 4790–4811), which contemplated the doing of business by agents. Not only did the *Swing* case arise under a different statute, but the contention of the plaintiff in that case was that, since the Act did not make the contract void but only suspended the right to enforce the contract until compliance, the fact of noncompliance constituted only matter in abatement which was waived by failure to plead it as such before the general denial and other matters in bar. Only this issue was decided; the court expressly refused to determine whether the contract was void or simply unenforceable. In any event, the *Carper* and *Selph* cases have since declared the law to be that the Act of 1907 suspends or bars certain rights only in the state courts and does not make contracts entered into by noncomplying foreign corporation void or invalid.

The same is true of *Burroughs* v. *Southern Colonization Co.*, 96 Ind. App. 93; *Lowenmeyer* v. *National Lumber Co.*, 71 Ind. App. 458, and *Barnett* v. *Central Republic Bank and Trust Co.*, 100 Ind. App. 495 (see Pet. 22–23), which are intermediate appellate court decisions following the *Swing* case and not deciding the issue of the validity of the contracts.[2]

The court below quite properly chose to follow the latest state court decisions upon the construction of the Indiana statutes. Petitioner's charge (Pet. 13–14) that it refused to recognize and adopt local law is obviously wrong (see R. 123).

2. Petitioners contend that if recovery cannot be had in the state court, recovery cannot be had in the federal court (Pet. 28–30). But the latest expression of the Supreme Court of Indiana, in *Selph* v. *Illinois Pipe Line Co., supra* (approving *Peter & Burghard Stone Co.* v. *Carper, supra*) declares the contract valid and not void, while the *Carper* case reaches a similar conclusion and confines the operation of the statute to the Indiana courts on the very ground that such a contract is

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[2] *Swing* v. *Wellington*, 44 Ind. App. 455, and *Wiestling, Receiver*, v. *Warthin*, 1 Ind. App. 217, cited by petitioners (Pet. 16), also involved the Indiana Foreign Insurance Corporation Act of 1877, as amended, and, as the *Swing* case, are similarly limited in scope, although in the latter decision the court erroneously (see *Rehm* v. *The German Insurance and Savings Institution of Quincy*, 125 Ind. 135 (1890)) considered also several immaterial sections of the Indiana Foreign Corporation Act of 1852.

enforceable in the courts of any other state and in the federal courts. In allowing suit, the court below simply enforced the statute as construed by the state courts. No problem under *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, arises.

In *David Lupton's Sons* v. *Auto. Club of America,* 225 U. S. 489, arising under a New York statute similar to that of Indiana, and involving an issue parallel to that of the instant case, this Court held that a contract entered into by a noncomplying foreign corporation was enforceable in the federal courts.

In *Elston* v. *Piggott,* 94 Ind. 14 (1883), the Supreme Court of Indiana held that a foreign corporation which had not complied with the Indiana Foreign Corporation Act of 1852[3] but in whose favor a decree had been entered in the federal court was entitled to enforcement of the decree and was free to make a sale thereunder. Furthermore, the Indiana Supreme Court has also held that a cross-complaint to quiet title, filed by the mortgagor in a foreclosure suit which had been filed by a foreign corporation which had not complied with the Act of 1852, could not be maintained, since the notes and mortgage were not void. *Daly* v. *The National Life Ins. Co. of the United States of America,* 64 Ind. 1 (1878).

[3] Ind. R. S. 1881, § 3025. The statute is similar to § 9 of the Act of 1907, 2 Burns Annotated Indiana Statutes, 1926, § 4918.

3. Petitioners contend that the decision in *Barnett* v. *Central Republic Bank and Trust Co.*, 100 Ind. App. 495, is the "law of the case" in this suit (Pet. 30–32). In that case, however, the Indiana court did not discuss or decide the effect of the Indiana Foreign Corporation Act of 1907 outside of the Indiana courts, or even the validity of respondent's note and mortgage. The decision could not be binding here as the "law of the case," which is confined to questions actually decided, *Connett* v. *City of Jerseyville*, 110 F. (2d) 1015 (C. C. A. 7th), and is also confined to subsequent proceedings in the same case, *Fidelity & Deposit Co.* v. *Port of Seattle*, 106 F. (2d) 777 (C. C. A. 9th). *Wichita Co.* v. *City Bank*, 306 U. S. 103; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; and *Eppenauer* v. *Ohio Oil Co.*, 98 F. (2d) 524 (C. C. A. 5th) go no farther than to require that the federal courts pay the same respect as do the state courts to state court decisions in an earlier stage of the litigation between the parties or their privies. Since, as we have shown, the decision in *Barnett* v. *Central Republic Bank and Trust Co.* did not preclude suit on the note and mortgage in the federal courts, it was given full effect by the decision below.

4. Petitioners assert that, in consequence of the two prior dismissals of actions brought on this claim, the present action is barred by Rule 41 (a) (1) of the Federal Rules of Civil Procedure (Pet.

32–33). But both of the dismissals referred to (R. 86, 91) took place long prior to the effective date of the Rules. Rule 86, making the Rules applicable to *further* proceedings in pending actions, plainly does not reach back to make the earlier dismissals with prejudice. Cf. *Rader* v. *Baltimore & Ohio R. R. Co.*, 108 F. (2d) 980, 986 (C. C. A. 7th).

## CONCLUSION

The court below correctly applied the Indiana law, and there is no conflict of decisions nor question of importance presented. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
*Acting Solicitor General.*
CLAUDE E. HAMILTON, JR.,
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*Reconstruction Finance Corporation.*
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M. O. HOEL,
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*Reconstruction Finance Corporation.*
JULY 1941.

## APPENDIX

Indiana Foreign Corporation Act of 1907, Section 1 (2 Burns Annotated Indiana Statutes, 1926, § 4909):

> Before any foreign corporation for profit shall be permitted or allowed to transact business or exercise any of its corporate powers in the State of Indiana, other than insurance companies, building and loan companies and surety companies, they (it) shall be required to comply with the provisions of this act and shall be subject to all the regulations prescribed herein, as well as all other regulations, limitations and restrictions applying to corporations of like character organized under the laws of this state.

Indiana Foreign Corporation Act of 1907, Section 9 (2 Burns Annotated Indiana Statutes, 1926, § 4918):

> Every foreign corporation amenable to the provisions of this act, which shall neglect or fail to comply with any of the provisions of the same, as herein provided, shall be subject to a penalty of not less than one thousand ($1,000) dollars nor exceeding ten thousand ($10,000) dollars, to be recovered before any court of competent jurisdiction, and it is hereby made the duty of the secretary of state, as he may be advised or may ascertain that any corporation is doing business in contravention of this act, to report such fact to the attorney-general, and it shall be the attorney-general's duty, and the

duty of the prosecuting attorney of the proper county to bring such action at law as shall be necessary for the recovery of the penalties imposed hereby, and, in addition to such penalty, if, after this act shall take effect, any foreign corporation shall fail to comply herewith, no suit may be maintained, either at law or in equity, upon any claim, legal or equitable, whether arising out of contract or tort, in any court in this state.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

## No. 212

FRED BARNETT AND EDNA M. BARNETT,
*Petitioners,*

*vs.*

RECONSTRUCTION FINANCE CORPORATION,
A CORPORATION,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

DOMINIC P. SEVALD,
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FRED BARNETT,
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## PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

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MAY IT PLEASE THE COURT:

We beg leave to submit this brief in reply to Respondent's brief in opposition to our petition for certiorari, for the reason that several inaccuracies and misstatements are contained in its answer brief. And to the end that we may help remove any possible confusion on the issues presented we thus ask the privilege to present these comments.

## SUMMARY STATEMENT.

Under the several headings of Opinion Below, Jurisdiction, Questions Presented, Statutes Involved, and Statement, respondent has made a substantially correct recital of the facts and issues as we have presented them, with the exception that under its Questions Presented (p. 2), the first part of question one stating: "Whether under state law the contract is void", we assert such is not involved in this record. The validity or non-validity of the contract (the note and mortgage) is not a vital point, excepting as made so in the opinion of the circuit court below, and which we say went beyond and outside the issues raised on the appeal before that court.

The actual question for determination in connection with this point is whether a judgment of foreclosure on these securities can be rendered and enforced in any court, state or federal, not necessarily because of their validity or invalidity, but because a legal defense in bar has been interposed which would defeat a recovery either on a valid or void contract.

As to the second part of this question one, we say if these securities are not enforceable in the state court, then no recovery thereon can be obtained in the federal court.

The second question, the law of the case, is present; also its third question,—on the effect of the two voluntary dismissals.

## ARGUMENT.

Respondent says we complain of the misinterpretation placed upon the Indiana decisions construing this foreign corporation act in the Circuit Court opinion below. We frankly say that neither this opinion nor that in the Kane case, as its authority, is well founded, because they follow the Stone Co. case (*Peter & Burghard Stone Co.* v. *Carper* (1930), 96 Ind. App. 554), and the Selph case (*Selph* v. *Ill. Pipe Line Co.* (1934), 206 Ind. 490), both of which were decided prior to the date of the opinion in the Barnett-Central Republic appeal.

Apparently opposing counsel ignore the fact that these two cases involved corporations still alive and functioning as such, both of which subsequently complied with the act, whereby the legal disability to operate in the state was removed. The present case questions the right of a holder of securities obtained from a corporation, since dissolved and non-existent, to enforce recovery thereon, where such corporation illegally operated in the state by its failure to comply, and by reason of its dissolution, rendering compliance impossible. The Indiana decisions mark a clear distinction in the two situations. Counsel have failed to meet this issue. The Stone Co. case, their leading authority, clearly points out this very distinction. We quote from it (96 Ind. App. 554, at p. 599):

> "The correct rule appears to be stated in *Swing* v. *Toner* (1912), 178 Ind. 102, 96 N. E. 946, where the court, quoting from 1 Chitty, Pleading (16th Am. Ed.) Sec. 462, said: 'Whenever the subject-matter of the plea or defense is that the plaintiff cannot maintain any action at any time whether present or future in respect of the supposed cause of action, it may, and usually must be pleaded in bar; but matter which merely defeats the present proceeding, and does not

show that the plaintiff is forever concluded, should in general be pleaded in abatement.'

If the contract is void, or where the foreign corporation has failed to comply with the statute, and by reason of insolvency, or otherwise, it has reached a state which prevents a compliance with the statute, the facts, with reference to its non-compliance and condition, may be pleaded in bar. (*Lowenmyer* v. *National Lumber Co.* (1919), 71 Ind. App. 458, 125 N. E. 67; *Wiestling* v. *Warthin, supra.*)''

It will be observed that the Swing case is given as authority in the foregoing. Therefore, respondent is rather inconsistent when it says this case should not be considered because it has before it a different foreign corporation act.*

Let us recall that in the Burroughs case (*Burroughs* v. *So. Colonization Co.* (1928), 96 Ind. App. 93, and the Lowenmyer case (*Lowenmyer* v. *Natl. Lumber Co.* (1919), 71 Ind. App. 458), the court had before it this same section as here involved. Further, the Burroughs opinion refers to the Stone Co. decision and makes no criticism of it. Then, the Stone Co. decision was rendered nearly five years prior to the date of the Barnett case opinion (*Barnett* v. *Central Republic Bank & Trust Co.* (1935), 100 Ind. App. 495), by the same court, which lapse of time afforded counsel for appellee in the latter case ample opportunity to cite it and rely upon it, but they did not do so.

Now, a discussion on a few of respondent's authorities. Reference is made to the Lupton case (*Lupton's Sons, David,* v. *Auto Club of America* (1912), 225 U. S. 489) as authority for the right to recover in the federal court. This involved the foreign corporation act of New York, which had as its only penalty a provision denying the offender

* Chapter 43, Acts 1877, p. 65, provides (Sec. 1) that it shall not be lawful for any agent of any insurance company incorporated by any other state—directly or indirectly, to take risks or transact any business of insurance in this State, without first producing a certificate of authority from the Auditor of State. A further requirement compels the company, among several other things, to authorize service of legal process upon the agent on its behalf.

access to the state courts. But since this decision is long prior to that in the Erie case, and in conflict with the latter, it is no longer an authority.

In *Elston* v. *Piggott* (1883), 94 Ind. 14, a prior action was filed in the federal court to foreclose a mortgage. The defendants therein did not plead the failure of the plaintiff corporation to register as a foreign corporation. In the second action, as cited, the court held the decree in the former action was final and not subject to a collateral attack on the ground of non-compliance. The case is not in point.

*Daly* v. *The National Life Ins. Co. of the United States of America* (1878), 64 Ind. 1, is not in point. No cross-complaint to quiet title was filed in that action. However, the defendant filed abatement to plaintiff's action for its failure to obtain a foreign corporation license. The trial court sustained plaintiff's demurrer to this plea. The Supreme Court held this an error and reversed the trial court.

In opposition to our contention that the Barnett-Central Republic decision is the law of the case, respondent says the Indiana court did not discuss the effect of the 1907 Corporation Act outside the courts of the state, or even the validity of the note and mortgage. Why should it? It is absurd to even suggest that our state court could control jurisdiction outside its own state. Anything it would say in that regard would be pure dicta. As to the validity of the securities, the appellee there made no assertion in this regard, and the court was not required to try that question.

In the Swing case the court was urged to commit itself on the question of validity, but it refused to do so, saying that such was not necessary; and that the fact of the failure to comply with the Act, coupled with the corporation's subsequent dissolution, thereby rendering compliance impossible, when interposed by a plea in bar to the action was sufficient. Nothing more is required.

We are confident the court will hold that it was the duty of the Circuit Court below to follow the doctrine laid down in the Erie case, which requires the federal court to follow and apply the State statutes and decisions. Among the several subsequent decisions of this court to the same effect is that of *Equitable Life Ins. Co.* v. *Halsey, Stuart & Co.* (1941), ..... U. S. ....., 85 L. ed. 631), which came up from the same circuit, and was there decided about two weeks subsequent to the decision in the present case. And the Circuit Court followed the wrong line of decisions of the Iowa courts on the question of the elements necessary to constitute fraud, etc. with reference to the sale of securities. This court reversed for such error. We have the same circumstance at bar in that respondent is here urging the wrong line of authorities on this question. The Wichita case (*Wichita Royalty Co.* v. *City Nat'l Bank* (1939) 306 U. S. 103), and the Stoner case (*Stoner* v. *N. Y. Life Ins. Co.* (1940), ..... U. S. ....., 85 L. ed. 275) are substantially identical with the present case, and which we have discussed in our main brief. We rely upon them.

## Conclusion.

We therefore assert respondent has not set forth a valid reason why the writ herein prayed for should not be granted. All the authorities it presents deal with the rights of a corporation still in existence, and where they did comply with the law. None are cited wherein the corporation has been dissolved, whereby future compliance is impossible. Respondent does not even contend that the contract of a non-existent corporation, in the hands of its successor or assignee can be enforced, excepting by virtue that the contract when made was not void, and which we show is not the controlling factor. The non-compliance is the bar to the prosecution of the action, and which remains so long as the non-compliance exists. It is the compliance that allows the prosecution, and without this prerequisite being

performed, the holder of the contract has no right to enforcement. Why was the Stone Co. allowed to prosecute its action? Not by reason of the validity of its contract, but solely by virtue of the fact that it registered as a foreign corporation, thus allowing it access to the State Court, and taking away the right of the defendant to file a plea in abatement by reason of non-compliance.

And the matters in issue were definitely and completely settled and determined by the Appellate Court of Indiana in the Barnett case decision. The original owner of these same securities voluntarily submitted itself and its cause to the jurisdiction of the State trial court, where it obtained a judgment in its favor. And it was so well satisfied with the validity of such judgment that seven days later its successor, as a substituted plaintiff, voluntarily dismissed another action against the same parties on the same securities it had seven months previously filed in the United States District Court below. Then following this reversal by the Appellate Court, the plaintiff apparently reasoned it could nullify the effect of this decision by dismissing its case in the State trial court. We stand on our assertion that this decision is the law of the case.

And again we pray that the court grant the writ of certiorari.

Respectfully submitted,

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August, 1941.

OCT 18 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## PETITION FOR REHEARING.

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## PETITION FOR REHEARING.

Come now Fred Barnett and Edna M. Barnett, the above-named petitioners in this cause, and present this their petition for a rehearing of their petition for a writ of certiorari in this cause.

### I.

### Jurisdiction.

Petition for writ of certiorari to the Seventh Circuit was filed June 26, 1941, and was denied on October 13, 1941.

## II-A.

### Reasons for Petition for Rehearing.

The petition for certiorari presented two questions in chief as the errors committed by the Seventh Circuit,—first, as to the effect of the Indiana foreign corporation act. This act makes unenforcible a contract of a foreign corporation which comes into the state, transacts its corporate business therein, fails to obtain a license therein as a foreign corporation, and then is dissolved or otherwise suspends its corporate existence. The Seventh Circuit, in its opinion in the cause, disregards this inhibition and holds that so long as the transaction involved is not illegal it can be enforced in the federal court, whether or not the corporation complies with the foreign corporation act of the state. If the opinion rendered below is allowed to stand, that section of the Indiana foreign corporation act in question is a nullity and becomes ineffective for any purpose whatsoever. This position is not in accord with the decisions of this Honorable Court which we have set out in the brief accompanying our petition, namely: *The Wichita Royalty* case (306 U. S. 103), and *The Equitable Life Insurance* case (..... U. S. ....., 85 L. ed. 361).

## II-B.

The second question is the effect of the decision of the Appellate Court of Indiana in the cause of *Barnett* v. *Central Republic Bank & Trust Co.* (100 Ind. App. 495). That decision is final and becomes and is the law of the case, and would control the action of a trial court in any further proceedings brought in a state court of Indiana, and would be binding upon it. This is the doctrine laid down in the *Erie R. R. Co.* v. *Tompkins* case (304 U. S. 64), *Equitable Life Ins. Co.* v. *Halsey Stuart & Co.* (85 L. Ed. 631), and

numerous other cases cited under Proposition III, page 17 of our brief in support of our petition.

If the opinion of the Seventh Circuit is permitted to stand, then hereafter a Federal District Court or a Federal Circuit Court of Appeals is at liberty to absolutely disregard and override a decision made by a state court of last resort, where the same cause is submitted on the same evidence.

## III.

### Public Importance.

It is a question of great public concern that the uniformity of decisions among and between the state and federal courts be maintained and that each shall respect the judgments and decisions of the other.

In the *Erie R. R.* case the court very clearly pointed out the abuses which had arisen under the former attitude of the federal courts with respect to their freedom to follow or disregard the state law or state court decision. And the court therein declared that hereafter the state law or decision would be followed. To the same effect is the *Stoner* case, and several others which we have discussed in our brief.

By the decision of the Indiana Appellate Court, it has been determined that recovery on this note and mortgage cannot be enforced against petitioners or the property involved. For this court to now decline to disturb the opinion of the circuit court below, petitioners would be and are deprived of an adjudication rendered in their favor by a duly constituted court having complete jurisdiction of the subject matter involved, and whose jurisdiction was invoked by the then owner of these securities. After the rendition of this decision no petition to reconsider or for a rehearing was ever filed, and on remand to the trial court the plaintiff voluntarily dismissed its action.

## IV.

For the foregoing reasons, petitioners respectfully urge that a rehearing be granted them, and that upon further consideration the order of October 13, 1941 denying their petition for writ of certiorari be revoked, and that a writ of certiorari issue herein.

Respectfully submitted,

DOMINIC P. SEVALD, and
FRED BARNETT,
*Counsel for Petitioners.*

October, 1941.

We, the undersigned Dominic P. Sevald and Fred Barnett, Counsel for Petitioners herein, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith, and not for delay.

DOMINIC P. SEVALD, and
FRED BARNETT,
*Counsel for Petitioners.*